CHG INDUSTRIES BHD & ORS A

v.

BURSA MALAYSIA SECURITIES BHD

HIGH COURT MALAYA, KUALA LUMPUR B
T SELVENTHIRANATHAN J
[ORIGINATING SUMMONS NO: D7-24-181-2004]
10 AUGUST 2007

COMPANY LAW: *Arrangements and reconstructions - Public listed company - De-listing - Restraining order - Whether de-listing could be effected in the face of a restraining order under s. 176(10) of Companies Act 1965 - Whether de-listing against public policy - Whether status quo to remain pending restructuring of company - Companies Act 1965, s. 176(10) - Securities Industry Act 1983, s. 11* C D

STATUTORY INTERPRETATION: *Construction of statutes - Purposive approach - De-listing of public listed company by Bursa Malaysia Securities - Restraining Order - Interpreting width and scope of s. 176(10) of Companies Act 1965 - Whether court to adopt liberal and purposive approach* E

The first applicant, a company listed on the main board of the respondent ('Bursa Securities'), had obtained a restraining order under s. 176(10) of the Companies Act 1965 granting it a 90-day moratorium against actions or proceedings by the creditors pending a proposed restructuring ('the RO'). It was a term of the RO that it did not apply to any proceeding taken by Bursa Securities unless otherwise ordered by the court. Be that as it may, Bursa Securities subsequently de-listed the first applicant from the board on the ground that the latter had not complied with its Practice Note on listing requirements ('PN4 listing requirements'). Before the learned judge, Bursa Securities argued that it was entitled to de-list the first applicant irrespective of the RO, since the same did not apply to regulatory proceedings so intended to be taken. In retort, the first applicant contended that the words "action" and "proceeding" in s. 176(10) were not limited to suits in court or court-related processes, but included also the enforcement of the PN4 listing requirements and the proceeding to de-list the first applicant. It was further argued that the *status quo* ought to be preserved, as any de-listing would have dire consequences for the investing public. In consequence, two issues came to be framed and addressed by the learned judge, namely: (i) whether, on a F G H I

proper interpretation of s. 176(10) of the Companies Act 1965, the court could restrain Bursa Securities from proceeding to de-list the first applicant; and, if so (ii) whether the court should exercise its discretion and issue a restraining order as such.

Held (issuing restraining order against respondent):

(1) Applying a purposive approach to the construction of s. 176(10), this court is inclined to hold that the words "action" and "proceeding" therein were not limited to creditor court actions or creditor court proceedings. Parliament would have so stipulated had that been its intention, as various other subsections of s. 176, including subsection 10, expressly use the words "creditor" and "member" when so intended. Consequently, the PN4 listing requirements containing the enforcement provisions must be read in conjunction and in consonance with the protection accorded to a company under s. 176(10). This must be all the more so in the case of a public-listed company, as the preservation of its listed status would be crucial to the success of the scheme of arrangement in relation to its restructuring. (*The Toronto Stock Exchange Inc v. United Keno Hill Mines Limited and UKH Minerals Limited* (foll)). (paras 13, 14 & 15)

(2) If a restrictive interpretation were to be given to s. 176(10), it would render impossible the achievement of a successful scheme of arrangement for a company in financial distress, thereby defeating the legislative intent to give such companies succour when it is most needed. It is also imperative that the court recognizes the element of public interest in allowing such companies the necessary breathing space to allow them to restructure their debts. Such element of public interest overrides the respondent's argument that it has a duty to the public to maintain investor confidence in the financial markets. The court would hence answer both questions in the affirmative. (paras 22, 23 & 24)

Case(s) referred to:

Bargain Harold's Discount Ltd v. Paribas Bank of Canada 7 OR (3d) 362; 1992 Ont Rep Lexis 405 ***(refd)***

Campeau v. Olympia & York Developments Ltd Ontario Court [1992] ACWSJ Lexis 34654 ***(refd)***

Chef Ready Foods Ltd v. Hongkong Bank of Canada [1990] ACWSJ Lexis 57976 ***(refd)***

Dalgety Wine Estates Proprietary Limited v. Rizzon and Another [1978-1979] 141 CLR 552 ***(refd)***
Elan Corp v. Comiskey 1 OR (3d) 289 ***(refd)***
Gray v. Wentworth Canning Company Limited 31 CBR 182 ***(refd)***
Herbert Berry Associates Ltd v. Inland Revenue Commissioners [1978] 1 All ER 161 ***(refd)***
Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director General of Trade Unions & Ors [1990] 2 CLJ 405; [1990] 2 CLJ (Rep) 218 HC ***(refd)***
Lehndorff General Partner Ltd (Re) [1993] ACWSJ Lexis 43587 ***(refd)***
Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745 HC ***(refd)***
Meridian Developments Inc v. Toronto-Dominion Bank [1984] AR Lexis 3469 ***(refd)***
Norcen Energy Resources Ltd v. Oakwood Petroleums Ltd [1988] AR Lexis 4694 ***(refd)***
OSK & Partners Sdn v. Tengku Noone Aziz Tengku Mahmood and Another [1983] 1 CLJ 288; [1983] CLJ (Rep) 317 FC ***(refd)***
Quintette Coal Ltd v. Nippon Steel Corp [1990] ACWSJ Lexis 58441 ***(refd)***
RA Ringwood Pty Ltd v. Lower [1968] SASR 454 ***(refd)***
Re Clements Langford Pty Ltd [1961] Vic Lexis 543 ***(refd)***
Re Norfolk Island and Byron Bay Whaling Co Ltd and Companies Act [1970] 1 NSWR 221 ***(refd)***
Re Stockbridge Ltd [1993] 11 ACLC 201 ***(refd)***
Re Timberland Limited and Equitable Forestry Services Pty Ltd [1976] Vic Lexis 102 ***(refd)***
Sairex GmbH v. Prudential Steel Ltd Ontario Court [1991] ACWSJ Lexis 36786 ***(refd)***
Scaffold Connection Corp (Re) [2000] ACWSJ Lexis 47056 ***(refd)***
Shaheen Abu Bakar v. Perbadanan Kemajuan Negeri Selangor [1996] 2 CLJ 965 CA ***(refd)***
Smoky River Cold Ltd (Re) 175 DLR (4th) 703 ***(refd)***
Syed Mubarak Syed Ahmad v. Majlis Peguam Negara [2000] 3 CLJ 659 CA ***(refd)***
The Toronto Stock Exchange Inc v. United Keno Hill Mines Limited and UKH Minerals Limited [2000] Ont Sup CJ Lexis 1059 ***(foll)***
Tunas (Pte) Ltd v. Mayer Investment Pte Ltd & Ors [1989] 2 MLJ 132 ***(refd)***
Ultracare Management Inc v. Zevenberger (Trustee) [1990] ACWSJ Lexis 58781 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 176(10)
Interpretation Acts 1948 and 1967, s. 17A
Securities Industry Act 1983, s. 11

A *For the applicants - Ranjit Singh (David Lai with him); M/s Ranjit Ooi & Robert Low*
For the respondent - Nahendran Navaratnam (Priscilla Raj, SJ Hoe & Brendan Siva with him); M/s Kadir, Andri & Partners

B *Reported by WA Sharif*

JUDGMENT

C **T Selventhiranathan J:**

[1] Enclosure (2) was an *ex parte* originating summons filed by the applicants herein pursuant to s. 176(10) of the Companies Act 1965 ("s. 176(10)") for a restraining order to be issued for a period of ninety days pending their proposed restructuring.

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[2] The first applicant ("CHG"), a public company, was listed on the main board of Bursa Malaysia Securities Berhad (also "the respondent", formerly known as the Kuala Lumpur Stock Exchange) on 13 November 1992. The second and third
E applicants were subsidiaries of CHG and together with other subsidiaries of CHG were collectively known as the CHG Group.

[3] On 6 September 2001, CHG announced that it was an affected listed issuer pursuant to Practice Note 4/2001 Criteria
F and Obligations pursuant to Paragraph 8.14 of the Listing Requirements ("PN 4" and/or "the listing requirements") issued by the respondent. The criteria, as spelt out in para. 2 of the listing requirements, included a deficit in the adjusted shareholders' equity of the listed issuer on a consolidated basis.

G **[4]** On 2 August 2004, a restraining order was granted by this court on condition that the order shall not apply to any proceedings taken by Bursa Malaysia Securities Berhad unless otherwise ordered by this court. Further, on the oral application of Bursa Malaysia Securities Berhad and by consent of the parties,
H leave was granted to Bursa Malaysia Securities Berhad to intervene in and to be added as the respondent to the proceedings herein. The parties also agreed to be heard *inter partes* on the issue of whether the restraining order granted by this court pursuant to s. 176(10) on 2 August 2004 should apply to the
I respondent in these proceedings.

[5] Two agreed issues were framed *vide* encl. (14) for the determination of this court in relation to encl. (2) in the following terms:

1. Whether, on a proper interpretation of section 176(10) of the Companies Act 1965, this court had the power to restrain the respondent, Bursa Malaysia Securities Berhad ("Bursa Securities") from proceeding with procedures to de-list the first applicant, CHG Industries Berhad, from the official list of the Bursa Securities.

2. If the answer to issue 1 above was in the affirmative, whether, on the facts of this particular case, this court should exercise its discretion to issue the restraining order as such.

[6] It was the respondent's case that the restraint under s. 176(10) was limited to proceedings that related to financial liability in the nature of a debt and that it was not intended to apply to regulatory proceedings. It was further argued that the purpose and intent of s. 176(10) was to preserve the financial position of the company concerned while the company attempted to rehabilitate itself. This was a financial consideration and at best the restraining order could only extend to afford the company protection against its creditors and other contracting parties which were themselves contingent or prospective creditors, ie those who had money claims. In the view of the respondent, s. 176(10) could not be used to justify an encroachment by the courts into the exercise of their powers by statutory or quasi-statutory bodies and to restrain proceedings initiated by them for breach of statutory obligations. As such, it was the contention of the respondent that the first applicant was bound by the respondent's PN4 listing requirements and that the respondent was entitled to proceed to de-list the first applicant even though a restraining order had been given by this court pursuant to s. 176(10).

[7] It was further contended by the respondent that the jurisdiction of the court under s. 176(10) was discretionary in nature and therefore even if the exercise of that discretion was sufficiently wide to restrain the respondent from embarking on the de-listing proceedings of the first applicant, it should not be exercised to restrain the respondent because it would effectively deprive it of its power to enforce the PN4 listing requirements pursuant to s. 11 of the Securities Industries Act 1983, and the question of whether the first applicant should or should not be

de-listed was not a question for the court to decide under s. 176(10). Finally, it was contended that the duty of the respondent was to preserve and enhance the working of the capital markets, which served the public interest in general, and the enforcing of the PN4 listing requirements also served the public interest in particular.

[8] On the other hand, it was the applicants' case that the words "action" and "proceeding" in s. 176(10) were not limited to only suits in court or court-related processes but that they also included the enforcement of the PN4 listing requirements and the proceeding to de-list the first applicant, the jurisdiction to do which fell under the Securities Industries Act 1983.

[9] The applicants argued further that the object underlying s. 176(10) was clear in that it was to give affected companies a moratorium to salvage their position. Hence, in interpreting the with and scope of s. 176(10), the court should adopt a liberal and purposive approach, failing which s. 176(10) would lose its purpose.

[10] The applicants also contended that s. 176(10) allowed a company in financial distress to seek the court's protection whilst it proposed and secured a rehabilitation scheme to bring it out of such financial distress. The court therefore had power generally to restrain actions or proceedings against the company in question in order to give the company a chance to get out of its distressed position without being harassed or having its position materially changed to its detriment. In short, a restraining order preserved the *status quo*.

[11] It was finally contended that to look at the position in any other way and to suggest that a public-listed company could be de-listed whilst undergoing a scheme of arrangement under s. 176(10) would be to render the protection afforded by that section completely illusory. It was more so when the insolvency of the company, which set the basis of the right to protection under s. 176(10), would also result in a breach of the PN4 listing requirements if the restraining order was not granted. It was further said that quite apart from the involvement of public interest in seeing a financially distressed company being able to rehabilitate itself, the de-listing of a public-listed company would have dire consequences for the shareholders of the company from amongst the investing public.

[12] In addressing the issues framed, it was my view that when interpreting a statute, the construction that would promote the purpose and/or the object of the statute was to be preferred over other forms of possible construction. Indeed, parliament gave express effect to this approach to the construction of a statute when it enacted s. 17A of the Interpretation Acts 1948 and 1967 in the following terms:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[13] This purposive approach to construction was adopted by the Court of Appeal in *Syed Mubarak bin Syed Ahmad v. Majlis Peguam Negara* [2000] 3 CLJ 659 and I likewise adopted that approach in the present case. I was further fortified in my decision to apply the purposive rule of construction to the interpretation of s. 176(10) to hold that the words "action" and "proceeding" in that section were not to be limited to creditor court actions or creditor court proceedings because parliament would have so stipulated in s. 176(10) had that been its intention as various other subsections of s. 176, including subsection (10) of that section itself, expressly use the words "creditor" and "member" when so intended.

[14] Hence it was my view that the PN4 listing requirements containing enforcement provisions must be read in conjunction and consonant with the protection accorded to a company under s. 176(10). This must be all the more so in the case of a public-listed company as the preservation of its listed status would be crucial to the success of the scheme of arrangement in relation to its restructuring.

[15] In adopting such an approach, I was guided by the reasoning in the Canadian case of *The Toronto Stock Exchange Inc v. United Keno Hill Mines Limited and UKH Minerals Limited* [2000] Ont Sup CJ Lexis 1059 whereby proceedings taken by the Toronto Stock Exchange to lift the stay imposed on 18 February 2000 by Lane J of the Ontario Superior Court of Justice, and then extended, were held to be "proceedings" under the Companies' Creditors Arrangement Act RSC 1985 c C-36 ("CCAA"), incorporating the Canadian equivalent of s. 176(10).

[16] It would be apt here to quote Lane J at pp. 4 to 6 of the report of that case submitted to me:

> On the evidence, I am persuaded that holding the proposed hearing would itself be seriously problematic for United Keno's efforts to restructure, and any suspension of trading would devastate its chances of success. On the other hand, the TSE has failed to present concrete evidence of harm, actual or potential, to the public from the continuance until June 23rd of the trading of the company's shares.
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> In its Factum, the TSE presented the CCAA as simply an Act designed to facilitate compromise between a debtor and its creditors and therefore the issue before me was one between the private parties United Keno and its creditors on the one hand; and the TSE representing the public on the other. In his oral argument, responding to a question, counsel did acknowledge that the CCAA was remedial legislation intended to forward a public interest, but contended that the discretion to be exercised was really related to the creditors' position versus the regulators. I think counsel has cast the net too narrowly. The CCAA is as much an instrument of a public policy as are the TSE and the Securities Act. The public policy behind the CCAA seems to me to be the recognition that permitting commercial enterprises a breathing space to restructure is good not only for the enterprise and its creditors, but also for the public which includes among its members the employees, suppliers, shareholders, landlords and customers of the enterprise. It is also beneficial to the public as a whole to enable enterprises to regain the opportunity to contribute to the country's economic strength. A similar list of affected constituencies is found in the decision of Austin J in *Bargain Harold's Discount Ltd v. Paribas Bank of Canada* [1992] 10 CBR (3rd) 23 (Ont Ct GD). That the public interest is relevant and is generally served by permitting an attempt at reorganization, was recognized by Gibbs JA in *Chef Ready Foods Limited v. Hong Kong Bank of Canada,* BCCA October 29, 1990, unreported, (cited in *Elan Corp v. Comiskey* [1990] 1 OR (3rd) 289 (CA) per Doherty JA, dissenting, 306) where Gibbs JA noted that:
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> > Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day [1933] sought through the CCAA to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business ...

Later, Gibbs JA referred to the Act as serving a 'broad constituency of investors, creditors and employees ...'. In *Ultracare Management Inc v. Zevenberger (Trustee of)* [1990] 3 CBR (3rd) 151 (Ont Ct GD), Hoilett J referred to '... the remedial nature of the legislation and the purpose it is intended to serve, as well as the liberal interpretation mandated ...'. In *Elan*, Doherty JA referred to the CCAA as 'remedial in the purest sense in that it provides a means whereby the devastating social economic effects of bankruptcy or creditor-initiated termination of ongoing business operations can be avoided ...'.

These cases show that the CCAA is recognized, in its own right, as an instrument of national economic and social policy deserving of a wide and liberal interpretation to enable it to serve these purposes.

Viewing the matter, then, as involving two streams of public policy, I turn to the discretion I must exercise. The interests of the affected parties must all be weighed. On the one hand, as noted, the evidence indicates that the TSE's proposed action would be very harmful to the company, its shareholders, creditors, employees, suppliers and customers because it would likely destroy the opportunity to reorganize and continue in business. On the other hand, the TSE urges its public duty. At paragraph 19 of its Factum, the TSE describes its purpose, derived from the securities regulation regime, as: 'to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets.' There is no evidence that United Keno has been involved in any unfair, improper or fraudulent practice, or that the market is less fair or less efficient because its shares are traded. It is asserted that the maintenance of investor confidence in the TSE is a reason to proceed, without any details of why the continued listing of a CCAA company during a brief and public restructuring period would have an adverse effect, particularly when it is admitted that other companies in the same or similar situations have continued to be traded.

In paragraph 21 of its Factum, the TSE lists its reasons for wishing to review the company's listing. They are the very reasons which drive companies into the CCAA regime. If the TSE were allowed to prevail for those reasons, simpliciter, without any showing of a factual foundation for believing that the public interest is genuinely at risk, the remedial purposes of the CCAA would be undermined.

A The TSE also submitted that the priority of public interest regulators over the private interests of the CCAA parties had been recognized by Farley J in *Re Anvil Range Mining Corp* cited above. It is important to note that what was permitted there was a hearing before the Yukon utilities regulator to set the general level of rates for power users, of which the company was the single largest customer. It was not a hearing like the one proposed here, aimed directly at the protected company and with the objective of depriving it of an important asset. Further, the decision was that the hearing should not proceed until the company had sufficient time to prepare without unduly interfering with its restructuring efforts. This decision does not by any means establish a general priority for regulators over the CCAA; if anything, it reinforces the absence of any such general priority, and the need to proceed on the particular facts of each case.

In my view, on the evidence before me, the serious risk to United Keno and those involved in its survival, and to the public interest considerations derived from the CCAA, outweigh the largely speculative and unproven allegations of prejudice to the TSE in the execution of its public interest mandate.

For these reasons, I decline to lift the stay for the purpose requested. The motion is dismissed. Costs may be addressed by appointment or through correspondence if the parties agree.

[17] With respect, despite the authorities cited to me *in extenso* by Mr Nahendran Navaratnam, learned counsel for the respondent, I was persuaded by the reasoning of Lane J in *The Toronto Stock Exchange* case in arriving at my decision. I hasten to add, to give credit where it is due, that it was through the laudable efforts of Mr Navaratnam that this case was brought to the notice of learned counsel for the applicants and the court.

[18] In his submissions, Mr Navaratnam cited the following authorities in support of his position that both the issues posed to the court should be answered in the negative:

1. *Re Norfolk Island and Byron Bay Whaling Co Ltd and Companies Act* [1970] 1 NSWR 221
2. *OSK & Partners Sdn v. Tengku Noone Aziz Tengku Mahmood and Another* [1983] 1 CLJ 288; [1983] CLJ Rep 317
3. Chapter C-25, Revised Statutes of Canada 1970
4. Chapter C-36, Companies' Creditors Arrangement Act 1985

5. Between: Milner Greenhouses Limited, Applicant- and- The Government of Saskatchewan, Respondent 2004 Sask DJ 2089; Sask DJ Lexis 118

6. *RA Ringwood Pty Ltd v. Lower* [1968] SASR 454

7. *Re Timberland Limited and Equitable Forestry Services Pty Ltd* [1976] Vic Lexis 102

8. *Herbert Berry Associates Ltd v. Inland Revenue Commissioners* [1978] 1 All ER 161

9. *Gray v. Wentworth Canning Company Limited* 31 CBR 182; [1950] 2 WWR 1285; 58 Man R 456 Westlaw

10. *Re Stockbridge Ltd* [1993] 11 ACLC 201

11. *Dalgety Wine Estates Proprietary Limited v. Rizzon and Another* [1978-1979] 141 CLR 552

12. *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director General of Trade Unions and Three Others* [1990] 2 CLJ 405; [1990] 2 CLJ (Rep) 218

13. *Tunas (Pte) Ltd v. Mayer Investment Pte Ltd and Others* [1989] 2 MLJ 132

14. *Re Clements Langford Pty Ltd* [1961] Vic Lexis 543

15. *Shaheen bte Abu Bakar v. Perbadanan Kemajuan Negeri Selangor* [1996] 2 CLJ 965

16. *Chef Ready Foods Ltd v. Hongkong Bank of Canada* [1990] ACWSJ Lexis 57976; [1990] ACWSJ 687021; 23 ACWS (3d) 976

17. *Elan Corp v. Comiskey* 1 OR (3d) 289; 1990 Ont Rep Lexis 37

18. *Quintette Coal Ltd v. Nippon Steel Corp* [1990] ACWSJ Lexis 58441; ACWSJ 687489; 24 ACWS (3d) 172

19. *Ultracare Management Inc v. Zevenberger (Trustee)* [1990] ACWSJ Lexis 58781; 1990 ACWSJ 687831; 24 ACWS (3d) 500

20. *Bargain Harold's Discount Ltd v. Paribas Bank of Canada* 7 OR (3d) 362; 1992 Ont Rep Lexis 405

21. *Lehndorff General Partner Ltd (Re)* [1993] ACWSJ Lexis 43587; 1993 ACWSJ 576751; 37 ACWS (3d) 847

22. *Scaffold Connection Corp (Re)* [2000] ACWSJ Lexis 47056; 2000 ACWSJ 505418; 94 ACWS (3d) 422

[19] He placed reliance on the English and Australian authorities cited to try and persuade the court that the reasoning in those authorities should be preferred over that in *The Toronto Stock Exchange* case to give s. 176(10) a more restrictive meaning in relation to the scope of operation of the restraining order.

[20] At this juncture I must say that the learned counsel for the respondent acted in the best traditions of the bar when he brought *The Toronto Stock Exchange* case, which was against his cause, to the attention of opposing counsel and then proceeded to advance reasons as to why the court should prefer the approach taken in the English and Australian cases over that taken in *The Toronto Stock Exchange* case in Canada.

[21] The learned counsel for the applicants, Mr Ranjit Singh, while acknowledging his indebtedness to Mr Navaratnam for his candour in bringing to his notice *The Toronto Stock Exchange* case, also relied on the following authorities to urge the court to answer the issues posed in the affirmative:

1. *The Concise Oxford Dictionary of Current English,* Ninth Edition, Clarendon Press-Oxford 1995

2. *The Concise Oxford Dictionary of Current English,* Eighth Edition, Clarendon Press-Oxford

3. *Lim Hean Pin v. Thean Seng Co Sdn Bhd and Others* [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745

4. KLSE Listing Requirements: Practice Note 4/2001

5. Section 11 of the Securities Industry Act 1983

6. Section 17A of the Interpretation Acts 1948 and 1967

7. *Syed Mubarak bin Syed Ahmad v. Majlis Peguam Negara* [2000] 3 CLJ 659

8. *Meridian Developments Inc v. Toronto-Dominion Bank* [1984] AR Lexis 3469; 53 AR 39

9. *Norcen Energy Resources Ltd v. Oakwood Petroleums Ltd* [1988] AR Lexis 4694; 92 AR 81

10. *Smoky River Cold Ltd (Re)* 175 DLR (4th) 703; [1999] DLR Lexis 299

11. *Sairex GmbH v. Prudential Steel Ltd Ontario Court* [1991] ACWSJ Lexis 36786; 1992 ACWSJ 565587; 31 ACWS (3d) 1268

12. *Campeau v. Olympia & York Developments Ltd Ontario Court* [1992] ACWSJ Lexis 34654; [1992] ACWSJ 570697; 35 ACWS (3d) 679

[22] My preference for taking a purposive approach in the interpretation of s. 176(10) as espoused in *The Toronto Stock Exchange case* was that if a restrictive interpretation were to be given to that section, it would render impossible the achievement of a successful scheme of arrangement for a company in financial distress, thereby defeating the legislative intent to give such companies succour when most in need. It was imperative that the court recognized the element of public interest in allowing such companies the necessary breathing space to allow the restructuring of their debts. In exercising its discretion in the matter, the court was of the considered view that such public interest overrode the argument of the respondent that it had a duty to the public to maintain investor confidence in the financial markets.

[23] In the present case, the applicants contended that the final success of their scheme of arrangement depended wholly on the continued listing of the first applicant since the scheme involved the acquisition by a new company ("the Newco") of the entire issued and paid-up capital of the first applicant, and the transfer of the listing status of the first applicant to the Newco. Should the scheme succeed, the applicants would be back on their feet and be able to regularize their financial position and cease to be subject to the PN 4 listing criteria, which in turn would be in the public interest. Furthermore the restraining order that was given was to last for ninety days only and was not a perpetual restraining order.

[24] In the above circumstances I answered both issues as framed in encl. (14) in relation to encl. (2) in the affirmative and to be limited to the de-listing proceedings only and for the same to inure for ninety days from the grant of the restraining order.

[25] As the issues involved a question of public interest, the parties had agreed that they would bear their own costs, and I ordered accordingly.